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WILSON'S ADM'X *v.* VIRGINIA PORTLAND RY. CO.

Nov. 15, 1917.

[94 S. E. 347.]

1. Master and Servant (§ 240 (1)*)—Contributory Negligence—Railroad Tracks.—An employee working in railroad yards, who was thoroughly familiar with the yard and its operation, and knew that it was a common practice to make a flying switch, was negligent in going and remaining on a track without looking for approaching cars.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 705, 707.]

2. Master and Servant (§ 248*)—Liability for Injuries—Last Clear Chance Doctrine.—Where the man at the brake on a car shunted upon a track by a flying switch, saw another employee standing on the track in an attitude plainly indicating that he was unconscious of the danger, in time to have stopped the car before striking him, the employer was liable for his death under the last clear chance rule, though the immediate circumstances of the accident transpired in a very short space of time.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 701; 10 Va.-W. Va. Enc. Dig. 389.]

3. Master and Servant (§ 248*)—Liability for Injuries—Last Clear Chance Doctrine.—The brakeman having actually seen decedent in a position and under circumstances sufficient to charge him with knowledge that he was heedless of the danger, and would take no step for his own safety, the fact that no duty of prevision rested on the employer, was immaterial.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 701; 10 Va.-W. Va. Enc. Dig. 389.]

4. Evidence (§ 571 (1)*)—Expert Testimony—Weight.—The testimony of an experienced yard brakeman, who was furnished full information, as to the size and character of a car, the rate of speed at which it was running, the condition of the brakes, and the grade of the track, as to the distance within which it could have been stopped, was not without probative value.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 788.]

5. Master and Servant (§ 286 (3)*)—Actions for Injuries—Questions for Jury.—In an action for the death of an employee, struck by a car shunted on a track by a flying switch, evidence held sufficient to make a question for the jury, as to whether the car could have been stopped by the brakeman thereon before striking him.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

6. Negligence (§ 83*)—Last Clear Chance Doctrine.—The last clear chance rule presupposes negligence of the injured person.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 389.]

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*For other cases, see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

7. Master and Servant (§ 248*)—Liability for Injuries—Last Clear Chance Doctrine.—If an employee, struck by a railroad car, saw the car in time to get out of the way, there could be no recovery under the last clear chance rule, as there was a case of concurring negligence.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 701, 702; 10 Va.-W. Va. Enc. Dig. 389.]

8. Master and Servant (§ 289 (40)*)—Actions for Injuries—Questions for Jury.—In an action for the death of an employee, struck by a railroad car, his declaration after receiving the fatal injury, that he saw the car coming, even if clearly understood and accurately repeated by the witness, who claimed to have heard it, did not justify the direction of a verdict, where a recovery was sought under the last clear chance doctrine, and other testimony showed that he never looked in the direction of the approaching car until it was too late to escape, as his declaration did not fix the point or the time at which he saw the car, and the jury was not necessarily bound to believe that he meant he saw it in time to get off the track.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

9. Master and Servant (§ 180 (2, 3)*)—Labilities for Injuries—Abolition of Fellow-Servant Doctrine—"Railroad Company."—A company chartered as a railway corporation, and regularly operating a railroad with engines propelled by steam, though doing no public business and operating exclusively for the private purposes of a cement company, under the same ownership and control, was a "railroad company" within Const. § 162 (Code 1904, p. cclix), and Code 1904, § 1294k, abolishing the fellow-servant doctrine, as its charter fixed its status as a corporation, and the character of the work it was carrying on brought it directly within the purpose of the law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad Company.* 6 Va.-W. Va. Enc. Dig. 23; 11 Va.-W. Va. Enc. Dig. 539; 14 Va.-W. Va. Enc. Dig. 859.]

Prentis and Burks, JJ., dissenting.

Error to Circuit Court, Augusta County.

Action by William T. Wilson's administratrix against the Virginia Portland Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and judgment directed.

Curry & Curry and *Timberlake & Nelson,* all of Staunton, for plaintiff in error.

A. C. Gordon, of Staunton, and *D. Lawrence Groner,* of Norfolk, for defendant in error.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.